4. Important utility and service facilities [11]
5. Research laboratories whose contributions are important to the national defense.

Sabotage in any facility included within the above five categories would plainly affect the national defense program, and the facilities so designated appear to be within the class of those covered by the federal sabotage statutes. 18 U.S.C. 2151-2157.[12] We have been advised that the total number of facilities designated by the Secretary of Defense is approximately 3,000, and that while the percentage of coverage varies from industry to industry, less than 1 percent of all manufacturing and production plants in the country have been designated by the Secretary.

The actual administration of Section 5(a)(1)(D) shows that it is being carried out consistently with the purpose for which it was enacted—*i.e.*, to protect facilities which are essential to the national defense from espionage and sabotage. The Secretary of Defense has exercised his discretion circumspectly and

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[11] The "utility and service" facilities referred to fall into the following four subcategories: communications, electric power, transportation and water supply. A facility is designated, however, only if damage to it would substantially affect the military production program. We have been advised by the Department of Defense that less than 1 percent of the country's "utility and service facilities" have, in fact, been designated.

[12] Indeed, the scope of these categories is substantially narrower than the coverage of the sabotage statutes since the latter concern not merely weapons or other military components but include such matter as "livestock, * * * forest products, * * * clothing, air, water, food * * *."

has, as the above statistics show, limited the application of Section 5(a)(1)(D) to those industrial plants and utilities throughout the country which are truly essential to the defense effort.

B. *The means chosen by Congress to protect defense facilities against espionage and sabotage are reasonable.*

Having demonstrated above that Congress was exercising its war power to protect defense facilities when it enacted Section 5(a)(1)(D), we turn now to the reasonableness of the means chosen to effectuate the legislative purpose. We recognize, of course, that "[i]t is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 164-165. At the same time, however, we invoke the very broad discretion which has traditionally been vested in the legislative and executive branches of government in the area of war and national defense. This Court observed in *Hirabayashi* v. *United States*, 320 U.S. 81, 93-94:

> Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. * * * Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice

> of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

At least so far as the reasonableness of the legislation is concerned [13]—laying to one side the First Amendment claims made by appellee (pp. 40-48, *infra*)—the appropriate standard by which to test Section 5(a)(1)(D) is that formulated in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, and reiterated by this Court as recently as *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326, and *Katzenbach* v. *Morgan*, 384 U.S. 641, 650:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

In this case the "end" is the protection of defense facilities essential to the national security from espionage and sabotage. The means chosen—(1) an absolute prohibition upon employment in such facilities (2) of members of Communist-action organizations (3) punishable by imprisonment and fine—are plainly "appropriate" to that end.

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[13] One of the grounds alleged by appellee in his motion to dismiss the indictment was that there was no showing of "any reasonable relationship * * * between a public or national interest which can be constitutionally protected and the means sought to be applied by this statute to protect such interest * * *" (R. 4).

1. *Congress reasonably decided to bar security risks absolutely from employment in defense facilities.*

We have noted above (pp. 18-21, *supra*) that Congress was well aware in 1950 that broad federal criminal statutes dealing with sabotage and espionage in war facilities were then in effect and that the Department of Defense was coordinating personnel security programs relating to employees of defense contractors. The President and the Department of Justice suggested to Congress that the existing statutes and practices were adequate safeguards against espionage and sabotage in defense plants (pp. 19-21, 24-26, *supra*). Congress, however, acted well within its powers when it rejected these views and determined that an absolute prohibition upon employment was necessary. The fact that criminal punishment could be imposed under existing laws if sabotage or espionage were actually committed and the saboteurs or spies apprehended did not foreclose Congress from taking more effective precautions. The considerations which prompted Congress here are similar to those which led this Court to conclude in *American Communications Association* v. *Douds*, 339 U.S. 382, 406, "that Congress should not be powerless to remove the threat, not limited to punishing the act": Injury to the national defense would be an accomplished fact before sanctions could be applied, considerable sabotage might occur at a time of external or internal crisis, and great practical difficulties would be encountered in detecting illegal sabotage or espion-

age activities.[14] Congress' power to protect the national defense is surely no more limited than its authority to provide for the health of the national economy; in both instances Congress may plainly act "in time to prevent potential injury * * * from becoming a reality." *North American Co.* v. *Securities and Exchange Commission*, 327 U.S. 686, 711.

Nor was Congress required to accept as sufficient the existing "industrial security" program. The effectiveness of such a program depends entirely on the control which the federal government has over the employer. Where the employer is a prime contractor with the United States, clearance requirements might be prescribed by contract for all his employees. Similarly, where secret or classified information is entrusted to a private employer, the government may impose, as a condition of such a trust, the requirement that the trustee's employees meet prescribed clearance standards. Essentially, however, our "industrial security" program has the effect of "safeguard[ing] classified information and material in the hands of defense contractors." *Report of the Commission on Government Security* (1957), p. 257. It does not provide adequate protection against sabotage of facilities which either do not contract directly with the government or cannot practicably have all

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[14] The apprehensions must be viewed in the light of the legislative finding, contained in Section 2(11) of the Act, 50 U.S.C. 781(11), that "[t]he agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law."

their employees subjected to clearance. But, as the following colloquy between the then General Counsel of the Department of Defense and Chairman Scherer of the House Un-American Activities Committee demonstrates, the harm of sabotage may be as great when the sabotaged plant does not contract directly with the government as when it does (*Hearings Relating to H.R. 9753 before the House Committee on Un-American Activities*, 87th Cong., 2d Sess. (1962), p. 447):[15]

> MR. BARTIMO: I believe, Mr. Chairman, to be sure that our legislative history is clear, that we should emphasize Mr. Scherer's point, and that is, that in my judgment—and I believe the Department of Justice concurs—it is not necessary that the Department of Defense or any other Government agency have a contract with a particular facility for the Secretary of Defense to properly implement the spirit and intent of this statute.
>
> As we all know, the defense of our country involves many individuals and plants and facilities. A power station might be of great significance, in spite of the fact that that power station doesn't have a direct contract with the Government. It might be so vital, however, in the manufacturing and supplying of power to facilities having a defense contract that the Secretary of Defense might feel it necesary, in order to imple-

[15] The subject of these hearings was the proposed amendment, later enacted, which eliminated from Section 5(b) the Secretary of Defense's obligation to publish the list of defense facilities in the Federal Register.

ment the spirit of this statute, to declare that power station a defense facility.

MR. SCHERER: Even if it were not furnishing power to a defense facility, a utility which might merely furnish the ordinary power to a municipality, in time of internal upheaval, could be so designated under this bill.

MR. BARTIMO: I agree, Mr. Scherer.

MR. SCHERER: I remember some years ago, when I was with city government, Army Intelligence told us that a few men, properly placed in the utilities and communications, could disrupt the operation of a municipality in a few minutes.

This feature substantially distinguishes defense-facility employees from governmental employees. Whereas national security may be sufficiently safeguarded with respect to the latter by conditioning employment upon prior clearance, the same cannot readily be done for defense-facility employees. It is no answer to suggest that Congress could henceforth impose a security-clearance requirement on all employees in defense facilities because such a statute would cast a staggering burden on the Department of Defense with respect to all present employees. Consequently, Congress reasonably concluded that the most efficient means of insuring the safety of defense facilities was to do at least what Section 9A of the Hatch Act had done for federal employees—absolutely prohibit continued employment of individuals who chose to retain their membership in foreign-dominated organizations which advocated the violent overthrow of the federal government.

By imposing an absolute bar Congress was simply recognizing that the best way to resolve problems arising out of a conflict of loyalties (such as members of Communist organizations might well have if they were employed in defense facilities) is "to remove tempting opportunities." *Board of Governors* v. *Agnew*, 329 U.S. 441, 449. The absolute prohibition in Section 5(a)(1)(D) "is a preventive or prophylactic measure" (329 U.S. at 449) just as the prohibition in Section 32 of the Banking Act of 1933, 48 Stat. 194, which was involved in the *Agnew* case and which prohibited any partner or employee of any partnership engaged in the underwriting or public sale of securities from serving as an officer, director or employee of a member bank of the Federal Reserve System.

2. *Congress reasonably supposed that members of Communist-action organizations are security risks*

In *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 93-94, this Court summarized the findings on which the Subversive Activities Control Act was based (50 U.S.C. 781):

> On the basis of its detailed investigation Congress has found that there exists a world Communist movement, foreign controlled, whose purpose it is by whatever means necessary to establish Communist totalitarian dictatorship in the countries throughout the world, and which has already succeeded in supplanting governments in other countries. Congress has found that in furthering these purposes, the foreign government

controlling the world Communist movement establishes in various countries action organizations which, dominated from abroad, endeavor to bring about the overthrow of existing governments, by force if need be, and to establish totalitarian dictatorships subservient to that foreign government. And Congress has found that these action organizations employ methods of infiltration and secretive and coercive tactics; that by operating in concealment and through Communist-front organizations they are able to obtain the support of persons who would not extend such support knowing of their true nature; that a Communist network exists in the United States; and that the agents of communism have devised methods of sabotage and espionage carried out in successful evasion of existing law. * * *

These findings, the Court noted, "are the product of extensive investigation by Committees of Congress over more than a decade and a half. * * * We certainly cannot dismiss them as unfounded or irrational imaginings." 367 U.S. at 94-95. They plainly support Congress' conclusion that any individual who voluntarily chooses to adhere to a Communist-action organization after receiving notice of a final order, based on a finding that the organization meets the standards of Section 3(3) of the Act, presents a sufficient danger of disloyalty to warrant his disqualification from federal and defense-facility employment.

We emphasize, in this regard, that the standards by which federal employees were evaluated under the loyalty procedures established by Executive Order in

1947 and 1951 were whether "reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" (Exec. Order No. 9835, 12 Fed. Reg. 1938) or whether "there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States" (Exec. Order No. 10241, 16 Fed. Reg. 3690).[16] The "reasonable doubt of loyalty" standard would, we submit, quite clearly support the dismissal of an individual who voluntarily chose to continue as a member of a Communist-action organization after he had received notice of the Subversive Activities Control Board's findings and order regarding that organization. We believe, in other words, that Congress could reasonably and fairly enact into law the presumption that a "reasonable doubt as to loyalty" exists with regard to any individual who, after being notified of a final order of registration directed at the organization, insists on retaining his membership.

We also note that Section 5(a)(1)(D) does not deal with "Communist-front" or "Communist-infiltrated" organizations, with respect to which the inference of disloyalty or danger to national security might well "turn on intangibles to be closely appraised."

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[16] Exec. Order 10450, 18 Fed. Reg. 2489, amended the standard to whether retention of the employee is "clearly consistent with the interests of the national security," intending thereby to reject clearance for employees who were loyal but who might nonetheless present security problems because of personal traits of character. See *Report of the Commission on Government Security* (1957), p. 267; Association of the Bar of the City of New York, *Report of the Special Committee on the Federal Loyalty-Security Program* (1956), pp. 150-151.

Communist Party v. *Subversive Activities Control Board*, 367 U.S. 1, 170 (Douglas, J., dissenting). The prohibition of Section 5(a) applies only to the "hard-core" of Communist affiliation—membership in an "action" group. If, as this Court has held "Congress has wide power to legislate in the field of Communist activity in this Country * * * [which] rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence * * *" (*Barenblatt* v. *United States*, 360 U.S. 109, 127-128), it must at least have the power to segregate the vanguard of this conspiracy from the establishments in which the defenses against it are being erected.

It is doubtless true that there are members of Communist-action organizations who would never consider committing either sabotage or espionage. But that does not make the line which Congress drew an impermissible one. As Judge Wyzanski noted in *Van Knorr* v. *Miles*, 60 F. Supp. 962 970 (D. Mass.), "Saboteurs do not parade with foreign credentials of professional competence. And arsenals are not guarded if watchmen exclude only those in whose satchels they have already found bombs. To avoid grave risks a prudent government may rationally favor a policy denying access to war plants not only by a person proved dangerous but also by any person in whom the government lacks absolute confidence."

Nor is the class designated by Congress invalid because there may be many who would commit sabotage in a defense facility and who are not members of Com-

munist-action groups. In exercising the war power to protect the national security against apprehended harm, "Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent." *Hirabayashi* v. *United States*, 320 U.S. 81, 100.

Finally, we note that there can be no claim here, as there was in *Wieman* v. *Updegraff*, 344 U.S. 183, that the prohibition amounts to "[i]ndiscriminate classification of innocent with knowing activity." 344 U.S. at 191. Section 5(a)(1)(D) does not apply, as did the oath in *Wieman*, to *past* membership in an allegedly communist or subversive organization; all it requires is that the individual subject to its prohibition choose, at the time he is given notice of his organization's duty to register and of his employer's status as a "defense facility," between membership in the organization and his employment. Knowledge of the obligation to register should put him on notice that there is substantial basis for belief that the organization's purposes are unlawful, and he cannot thereafter claim to be the innocent member with which this Court was concerned in *Wieman*. See 344 U.S. at 190.

3. *Congress reasonably chose to enforce the prohibition with a criminal sanction.*

Having determined to exclude all knowing and voluntary members of Communist-action organizations from employment in defense facilities, it was reasonable to implement that rule by imposing a criminal penalty on those who would violate it. As we have shown above (pp. 31-34, *supra*), Con-

gress could rationally conclude that neither a screening program nor the authority to demand discharges would sufficiently and immediately protect the interests for which the statute was designed. The threat of criminal sanctions, on the other hand, has an immediate *in terrorem* effect, and it requires no bulky administrative machinery to carry it into practice.

The court below misapprehended the purpose of the criminal sanction when it supposed that "Party membership" was an element of "criminality" (R. 8). Congress assessed a criminal penalty for violations of Section 5(a)(1)(D) not because it intended to punish members of Communist-action groups but because it sought to effectuate its policy of shielding defense facilities from such individuals. When, for example, a State punishes a marriage between brother and sister under its laws prohibiting incest, it is obviously not imposing a punishment on the status of being a brother—even though proof of the brother-sister relationship is an essential element of the offense. Nor is the State imposing a criminal penalty on an individual with defective vision if it forbids him, under pain of fine or imprisonment, to drive an automobile. Proof of his inadequate sight is doubtless a necessary element of the offense, but it does not follow—as the district court's reasoning in this case would have it—that having defective vision has thereby been made criminal.

C. *The provision as written does not unconstitutionally infringe First Amendment rights.*

We recognize, of course, that First Amendment freedoms of expression and association are affected

by any legislative regulation applicable, as Section 5 (a) (1) (D) is, to an entire class of persons identified only by their voluntary membership in an organization such as the Communist Party, which pursues both lawful and unlawful ends. That aspect of Section 5 (a) (1) (D) is the one which obviously troubled the district court and led it to conclude that to sustain the provision's constitutionality it would be necessary to establish a "nexus of guilt * * * depend[ing] on links more numerous and more substantial than those charged by the government" (R. 9). As recently as last Term, this Court held a State loyalty oath unconstitutional as an impermissible restraint on freedom of association on the ground that it permitted punishment of an individual notwithstanding his lack of "specific intent" to further the unlawful purposes of the organization to which he belonged. *Elfbrandt* v. *Russell*, 384 U.S. 11. Although Section 5(a) (1) (D) contains no "specific intent" provision and Congress did not intend that any such requirement be read into the statute (pp. 48-56, *infra*), we believe that, in light of the substantially graver governmental interest involved here, the statute is constitutional as written.

We begin with the proposition stated by this Court in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 160, and reaffirmed in *Aptheker* v. *Secretary of State*, 378 U.S. 500, 509, that "while the Constitution protects against invasions of individual rights, it is not a suicide pact." First Amendment freedoms are doubtless involved whenever Congress seeks to impose broad preventive measures against the threat of subversion by

foreign-dominated conspiracies such as it found to exist in the investigations preceding the enactment of the Internal Security Act of 1950 (of which the Subversive Activities Control Act is a part). But if the risk is severe enough—if it involves "the right of self-preservation, 'the ultimate value of any society'" (*Barenblatt* v. *United States*, 360 U.S. 109, 128, quoting from *Dennis* v. *United States*, 341 U.S. 494, 509)—great latitude must be allowed Congress to deal with the danger even at the expense of some otherwise impermissible effect on First Amendment freedoms. For, as this Court observed in *Wieman* v. *Updegraff*, 344 U.S. 183, 188, in adopting means to deal with disloyalty during a period of international stress, "the legislature is * * * confronted with the problem of balancing its interest in national security with the often conflicting constitutional rights of the individual." Whether or not the legislature has acted constitutionally depends upon whether it has struck a permissible balance. "Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve." *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 91.

The public interest in the regulation to which Section 5(a)(1)(D) pertains is obviously great, very much more so than the public purpose of the regulation in *Elfbrandt* v. *Russell*, 384 U.S. 11. "It is not mere rhetoric to say that the government's interest in avoiding sabotage and espionage in war time is one of its most vital concerns. National survival is

quite literally at stake. Every school boy knows that the experience of this nation during the last war [World War I] and of Continental countries during this war [World War II] shows how easily a country's military efforts may be hampered by the admission to war plants of persons who on their face appeared unobjectionable." *Van Knorr* v. *Miles*, 60 F. Supp. 962, 970 (D. Mass.).

The needs of this country's national defense in today's volatile world cannot, we submit, be made to turn on whether we are technically "at war." Congress recognized as much in amending the sabotage provisions of the Criminal Code, 18 U.S.C. 2151-2157, to include "national defense" as well as "war" materials, premises and utilities. Moreover, Presidential Proclamations have repeatedly declared the existence of a state of national emergency. See Pres. Proc. No. 2914, 64 Stat. A454 (1950); Pres. Proc. No. 3004, 67 Stat. C31 (1953); Exec. Order No. 10896, 3 C.F.R. (1959-1963 Compilation) 425 (1960); Exec. Order No. 11037, 3 C.F.R. (1959-1963 Compilation) 621 (1962).

In these circumstances the determination of who will have access to classified military projects, to establishments where important weapons systems are being produced, to ultilities on which national defense production depends and to research laboratories working on military projects is of utmost importance to the national security. As the Court of Appeals for the District of Columbia Circuit observed, referring to Section 5(a)(1)(D) in *Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531, 555:

"[D]efense facility employment * * * is sensitive business, and it would be sheer folly to say that the Government cannot close the gates of such facilities against those who are knowing members of organizations under the dominion of a foreign government."

Nor is the statute overbroad in its assessment of the danger. The risk presented by members of Communist-action organizations in defense facilities is not limited to those in the high echelons of defense employment or those having access to classified information. Since the danger is not merely espionage but sabotage as well, all employees of defense facilities who have access to the physical plant—even if not engaged in "sensitive" tasks (compare *Cole* v. *Young*, 351 U.S. 536)—are in a position to do harm to the national defense. Congress' aim was to eliminate *potential dangers; it* could, consistently with First Amendment protections, apply its prohibitions to all employees.[17]

We base our conclusion that Section 5(a)(1)(D) is constitutional as written not merely on the gravity of the public interest underlying the provision but also on the fact that it imposes lesser burdens upon those subject to its terms than other forms of regulation dealing with Communist organizations which this Court has sustained. Union officers who were members of the Communist Party could not retain their

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[17] Compare *Lerner* v. *Casey*, 357 U.S. 468, 474, in which this Court held that it was constitutionally permissible for New York to apply its Security Risk Law "to one employed in the major artery of New York's transportation system, even though [his] daily task was simply to open and shut subway doors."

positions under the Labor Management Relations Act if the union desired to use the services of the National Labor Relations Board. *American Communications Association* v. *Douds*, 339 U.S. 382. Deportation of former members of the Communist Party is permissible because "the Communist movement here has been heavily laden with aliens and * * * Soviet control of the American Communist Party has been largely through alien Communists." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 590. Accord, *Galvan* v. *Press*, 347 U.S. 522. Similarly, in *Carlson* v. *Landon*, 342 U.S. 524, the Court upheld a provision of the Internal Security Act of 1950 allowing the Attorney General to hold members of the Communist Party in custody without bail pending determination of their deportation. See, also, *Flemming* v. *Nestor*, 363 U.S. 603.

The Court has also upheld State laws imposing far more severe restrictions upon members of the Communist Party. In *Gerende* v. *Board of Supervisors of Elections*, 341 U.S. 56, the Court held unanimously that Maryland could require every candidate on the ballot to swear in an affidavit that he was not engaged in any attempt to overthrow the government by force and violence. *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, held that a city has power to require its employees to execute affidavits stating that they had not advocated or been members of an organization which advocated forcible overthrow of the government and disclosing whether they were or had ever been members of the Communist Party. *Adler* v. *Board of Education*, 342 U.S. 485, similarly ruled constitutional a New York statute, which makes any member of an

organization advocating the overthrow of the government by force or violence ineligible for employment in the public schools. *Beilan* v. *Board of Public Education*, 357 U.S. 399, and *Lerner* v. *Casey*, 357 U.S. 468, held that State officials could question employees about their Communist affiliations and discharge them if they refused to answer. And in *Konigsberg* v. *State Bar*, 366 U.S. 36, and *In re Anastaplo*, 366 U.S. 82, this Court upheld the power of a State to deny admission to the Bar to applicants who refused to answer questions pertaining to membership in the Communist Party. The practical effect of such measures was to deny public office or public employment to members of the Communist Party.

In sum, Section 5(a)(1)(D) is relevantly distinguishable from the statutes which were either held unconstitutional (*Aptheker* v. *Secretary of State*, 378 U.S. 500) or deemed of such doubtful constitutionality as to warrant the application of special rules of construction (*Scales* v. *United States*, 367 U.S. 203). *Aptheker* concerned Section 6 of the Subversive Activities Control Act which prohibited foreign travel by members of any "Communist organization" on the ground that such travel was likely to endanger the national security. Section 6 was plainly distinguishable for constitutional purposes from Section 5(a)(1)(D) in at least four respects: (1) it involved a much lesser risk to national security than does access to defense facilities; (2) it applied to members of "Communist-front" and "Communist-infiltrated" organizations as well as to members of "Communist-action" groups; (3) it infringed upon

a more basic freedom—the right to travel—than does a provision which affects only the right to be employed in a defense facility; (4) it imposed an absolute prohibition in a situation where a "less drastic" remedy could have achieved the same purpose. This Court's conclusion in *Aptheker* does not, for all these reasons, support the district court's view that Section 5(a)(1)(D) might be constitutionally vulnerable.

Nor is Section 5(a)(1)(D) analogous to the membership clause of the Smith Act, 18 U.S.C. 2385, which was rescued from constitutional attack only by this Court's construction of the clause as requiring "specific intent" and "active membership." *Scales* v. *United States*, 367 U.S. 203, 227-228. The membership clause makes the status of membership criminal, and it thereby presents the most direct confrontation between the First Amendment's protection of association and the interests of national security. It is one thing to say that an individual's voluntary association with a particular group raises sufficient doubt of his loyalty that he ought to be denied, on pain of fine or imprisonment, access to government secrets or to sensitive defense installations. It is quite another to treat that association, in and of itself, as criminal conduct. The latter obviously requires more than evidence of association with an organization which has both lawful and unlawful goals; otherwise it would conflict squarely with the First Amendment. In the former, on the other hand, the association is used only as an indication of a possible state of mind, and the forbidden conduct is not the association alone.

In short, Section 5(a)(1)(D) is distinguishable from the membership clause of the Smith Act on the same basis as is Section 9(h) of the Taft-Hartley Act of 1947: It "proceed[s], not against the groups or beliefs identified therein, but only against the combination of those affiliations or beliefs with occupancy of a position of great power over the economy [or the security] of the country." *American Communications Association* v. *Douds*, 339 U.S. 382, 403-404.

Finally, for the reasons elaborated in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 82-88, Section 5(a)(1)(D) cannot be deemed a bill of attainder. Unlike the statute involved in *United States* v. *Brown*, 381 U.S. 437, the Subversive Activities Control Act "attaches not to specified organizations but to described activities in which an organization may or may not engage." *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 86. On this ground the Court distinguished the Control Act from the provision it was considering in *United States* v. *Brown*, 381 U.S. 437, 451-452.

II

The Elements Prescribed by the District Court Are Not Required by Section 5(a)(1)(D)

Having discussed the constitutional issue which prompted the district court to construe the statute as it did, we turn now to the question whether Section 5(a)(1)(D) may fairly be interpreted as requiring proof of the additional elements which the court below found lacking in this indictment. The indictment made essentially six allegations (p. 13, *supra*),

but the court held it defective for failure to allege three other elements which it deemed "implicitly in the statute" (R. 9). The three elements are among those required for conviction under the membership clause of the Smith Act, 18 U.S.C. 2385, as construed by this Court in *Scales* v. *United States*, 367 U.S. 203:

1. That appellee had knowledge of the unlawful purposes of the Communist-action organization to which he belonged.
2. That appellee was an "active" member of the Communist-action organization.
3. That appellee had the "specific intent" to further the unlawful purposes of the organization.

For reasons stated above, we do not believe that the district court was under any constitutional compulsion to interpret the statute in this manner. Nor do we believe that there is any support for this construction in the language or legislative history of Section 5(a)(1)(D). Indeed, we submit that incorporation of the Smith Act standards into Section 5(a)(1)(D) would defeat the prophylactic purpose for which the statute was enacted. The district court therefore erred in dismissing the indictment for failure to allege these elements.[18]

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[18] Government counsel represented to the district court that these elements would not be proved by the prosecution. Hence this is a case in which the indictment was dismissed not for a failure of pleading but because of the district court's "construction of the statute upon which the indictment of information is founded." 18 U.S.C. 3731. *Scales* v. *United States*, 367 U.S. 203, 223, demonstrates, it is true, that elements such

A. *Neither the language nor the legislative history of Section 5(a)(1)(D) supports the district court's construction.*

In *Aptheker* v. *Secretary of State*, 378 U.S. 500, this Court held that Section 6 of the Subversive Activities Control Act of 1950 was unconstitutional on its face because it swept "too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment." 378 U.S. at 514. In reaching this judgment of unconstitutionality, the Court refused to read into Section 6 the elements prescribed in *Scales* v. *United States*, 367 U.S. 203, for conviction under the membership clause of the Smith Act, notwithstanding the usual rule, applied by the court below, that statutes should be so construed as to avoid constitutional doubts. The Court agreed in *Aptheker* with our suggestion that "neither the words nor history of Section 6 suggests limiting its application to 'active' members." 378 U.S. at 511, n. 9. See also *Elfbrandt* v. *Russell*, 384 U.S. 11, 16.

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as those involved here, which are not "discrete" elements but are "an inherent quality of the membership element" (*ibid.*) need not be expressly alleged in the indictment. But the government did not rely in the district court—nor does it here—on its right to prove these elements notwithstanding their omission from the indictment. We claim, rather, that they are not necessary elements of the statutory offense and concede, for purposes of this case, that if they were necessary it would be proper to dismiss the indictment on government counsel's representation to the district court that they would not be proved. On this threshold jurisdictional matter, his case is controlled by *United States* v. *Braverman*, 373 U.S. 405, where this Court assumed appellate jurisdiction under 18 U.S.C. 3731 under analogous circumstances.

The words of Section 5 which define the class to which its prohibitions apply are identical (exclusive of punctuation and capitalization) to the parallel portion of Section 6: Both provisions begin: "When a Communist organization, as defined in paragraph (5) of Section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—* * *." Absent a clear and convincing showing in the legislative history of Section 5, there is surely no reason to suppose—in view of the identity of language—that Congress intended different standards to apply in determining membership under Section 5 than in cases under Section 6.

If the legislative history is examined, it furnishes no support whatever for the district court's limiting construction. The prohibition upon employment in a defense facility first appeared in the House version of the Subversive Activities Control Act in the Eighty-first Congress; it had not appeared in the preceding Congress' version of the same bill, although it was suggested in separate legislation. Compare H.R. 9490 and H. Rep. No. 2980, 81st Cong., 2d Sess. (1950) with H.R. 5852 and H. Rep. No. 1844, 80th Cong., 2d Sess. (1948). See also note 7, *supra*; S. Rep. No. 2369, 81st Cong., 2d Sess. (1950), p. 6. The House report did not specifically advert to this change. It merely added to the proposed legislation, which had previously included prohibitions against federal employment and the application for and use of passports

by individual members of registered organizations, a separate subsection which made it unlawful for individual members to conceal their membership in applying or holding employment in a defense plant and for members of a Communist-action organization to engage in any employment in any defense plant. Neither the reports nor any discussion on the floor of either chamber suggests that any difference was contemplated between the membership standard to be applied under the passport prohibition and that applicable to the federal and defense-plant employment provision. We submit, therefore, that the Court's decision in *Aptheker* is controlling on the question whether Section 5 may be construed to require the allegation and proof of knowledge, active membership and specific intent to further unlawful purposes.

B. *Incorporation of these elements is inconsistent with the purpose of Section 5(a)(1)(D).*

We have shown (pp. 15-26, *supra*) that Section 5(a) of the Subversive Activities Control Act consisted of prophylactic measures designed to separate members of organizations subject to the Act, whose loyalty was subject to reasonable doubt, from employment which might affect the national secuirty. It is quite plain, we submit, that that purpose could not be served if the only individuals subject to the prohibitions of Section 5(a) were those few who could be successfully prosecuted under the membership clause of the Smith Act. Yet the district court's interpretation of the statute, which reads into it the elements necessary for a Smith Act conviction, has

precisely that effect. The only persons it effectively bars from employment in defense facilities are individuals who can be shown to have a personal commitment to the overthrow of the government by force and violence and have been actively engaged in this pursuit. As the district court has read the statute it no longer applies, as Congress wished it to do, to those whose loyalty is in doubt; it applies only to those whose disloyalty is known. Or, to use the metaphor invoked by Judge Wyzanski in *Van Knorr* v. *Miles*, 60 F. Supp. 962, 970 (D. Mass.), it guards the arsenal only by excluding those in whose satchels bombs have already been found.

That was plainly not Congress' intent. Section 5 (a) was not enacted to punish membership in "Communist-action" or "Communist-front" organizations as such, but to limit the access which members of these organizations theretofore had to government secrets and to defense plants. In every material respect, the design of Section 5 is, like the design of Section 32 of the Banking Act of 1933—which was upheld in *Board of Governors* v. *Agnew*, 329 U.S. 441, 449—"to remove tempting opportunities." This Court held in *Agnew* that the conflict-of-interest provision involved in that case prohibited an individual from occupying the two positions which gave rise to "tempting opportunities" irrespective of his subjective state of mind (329 U.S. at 449):

> Section 32 is not concerned, of course, with any showing that the director in question has in fact been derelict in his duties or has in any way breached his fiduciary obligation to the bank.

> It is a preventive or prophylactic measure. The fact that respondents have been scrupulous in their relationships to the bank is therefore immaterial.

Here, too, the degree of appellee's subjective commitment to the Communist-action organization of which he is a member is immaterial. The important question, from the vantage point of prevention, is whether, after having been given notice of the organization's status, he continues to be a member. Congress concluded that if he does, irrespective of his state of mind or the degree of his activity, he should not be afforded access to a defense facility.

To be sure, there were alternative solutions. Thus, in seeking to achieve a similar prophylactic purpose with respect to federal employees by means of Section 9A of the Hatch Act, now 5 U.S.C. 118(p)2, Congress required, as an element of that offense, proof that the employee had knowledge of his organization's purpose to overthrow the constitutional form of government of the United States. If this Court were to conclude in this case that some element other than bare continued voluntary membership must be read into the provision to save Section 5(a)(1)(D) from unconstitutionality, we submit that the requirement of knowledge of the organization's unlawful purposes would be more consistent with the provision's purpose than either of the other two prescribed by the court below. But we believe that because of the requirement that the individual have notice of the organization's obligation to register, Congress could constitutionally create the offense it did in Section 5(a)(1)(D) without requir-

ing the government to prove affirmatively how much he knew of the group's unlawful goals. Knowledge that an organization is under a duty to register as a "Communist-action" organization pursuant to an order of the Subversive Activities Control Board is certainly enough to put a member on notice that the organization's purposes may not be entirely innocent. Since Section 5(a)(1)(D) operates prospectively only and imposes no restriction whatever on an individual who resigns his membership, it was reasonable for Congress to presume that anyone who voluntarily chooses to remain a member of such an organization after being notified of its registration has knowledge —or is grossly negligent in failing to have knowledge —of its unlawful purposes.

The "active" membership requirement is entirely appropriate in determining whether an individual's association with a Communist organization is sufficient to subject him to criminal punishment for such association alone under the membership clause of the Smith Act. But it is quite inappropriate if the emphasis is, as in Section 5(a)(1)(D), on prevention and on the withdrawal of "tempting opportunities." Even an inactive or passive member of an "action" organization may, if employed in a defense facility, be subject to organizational pressures which would induce him to commit sabotage or espionage. And a classified military project can hardly be deemed secure against subversion if the only people excluded are those who have actively participated and furthered the endeavors of a "Communist-action" organization. This Court's statement in *Elfbrandt* v. *Russell*,

384 U.S. 11, 17, that "[t]hose who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees" must, of necessity, be qualified by the circumstances of particular situations. It would surely be a prudent and sound exercise of governmental power not to reveal the nation's most vital nuclear secrets to voluntary, albeit inactive, members of foreign-dominated organizations. Section 5(a)(1)(D) deals, of course, not with the highest level of secrecy, but its concern is an area in which security is a great desideratum. We submit that requiring proof of "active" membership would undermine Congress' objective.

Turning finally to "specific intent," we believe that such a requirement would convert Section 5(a)(1)(D) from a preventive measure aimed at persons whose reliability is in doubt to a prohibition imposed upon whose subversive intent is known. Congress did not wish to have the bar of Section 5(a)(1)(D) turn on the intent of any individual; it was obviously meant as complementary to the then-existing loyalty-security programs.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for trial.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

NATHAN LEWIN,
Assistant to the Solicitor General.

KEVIN MARONEY,
LEE B. ANDERSON,
Attorneys.

AUGUST 1966.

APPENDIX A

DEPARTMENT OF DEFENSE
OFFICE OF PUBLIC AFFAIRS
Washington 25, D. C.

IMMEDIATE RELEASE

No. 1363-62
OXford 53201
53176

August 20, 1962

DEPARTMENT OF DEFENSE IMPLEMENTS PROVISIONS OF INTERNAL SECURITY ACT

The Department of Defense has taken action under Section 5 of the Internal Security Act, as recently amended, which will make it unlawful for members of the Communist Party of the United States to be employed in designated "defense facilities."

Initially, several thousand facilities have been designated as "defense facilities" requiring the application of the provisions of the Internal Security Act and more will be designated in the future. Letters of notification are being mailed to these facilities. Plant managers are required by the Act to post notices of "defense facility" designation "in such form and in such place or places as to give notice thereof to all employees of, and to all applicants for employment in such facility."

The list of "defense facilities" is comprised of (1) facilities engaged in important classified military projects; (2) facilities producing important weapons systems, subassemblies and their components; (3) facilities producing essential common components, intermediates, basic materials and raw materials; (4) important utility and service facilities; and (5) re-

search laboratories whose contributions are important to the national defense. The list, which will be amended from time to time as necessary, has been classified for reasons of security.

The Internal Security Act makes it unlawful for a member of a Communist-action organization to engage in employment in any "defense facility," and requires a member of any Communist organization to disclose the fact of such membership in seeking, accepting or holding employment in any "defense facility." These provisions become effective when a Communist organization is registered with the Attorney General of the United States, or when there is a final order of the Subversive Activities Control Board requiring such an organization to register. The Communist Party of the United States was required to register as a Communist-action organization by an order of the Subversive Activities Control Board which became final on October 20, 1961.

The Internal Security Act also makes it unlawful for an officer or employee of a "defense facility" to contribute funds or services to such a Communist organization, or to advise, counsel or urge a member of such a Communist organization to violate provisions of the Act.

Each violation of the Act's prohibitions is punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or by both such fine and imprisonment.

APPENDIX B

THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON 25, D. C.

[SEAL]

20 August 1962

Todd Shipyards Corp
Seattle Repair Div
1801 Sixteenth St., SW
Seattle, Wash

Gentlemen:

This is to notify you that pursuant to the provisions of subsection (b) of section 5 of the Internal Security Act of 1950, as amended (64 Stat. 987, 992, 50 U.S.C. 784), the Secretary of Defense has designated the above facility as a "defense facility" for the purposes of applying the provisions of subsection (a) of that section.

The consequences of this designation are described in the enclosed posters.

Section 5 of the Act requires that you immediately post conspicuously notice of such designation in such form and in such place or places as to give notice thereof to all employees of, and to all applicants for employment in, such facility. The enclosed posters contain the information which must be posted. Reproduction of the poster-notice is permissible. Periodic checks should be made to assure that the notice or notices have not been obliterated or removed.

Further information and a limited number of copies of the poster-notice may be obtained by communicating with the Office of the Assistant Secre-

tary of Defense (Installations and Logistics), The Pentagon, Washington 25, D.C.

Please complete and mail promptly the enclosed return addressed postcard.

Sincerely,

/s/ Roswell Gilpatric

2 Encls:

1. Poster-notice, 2 cys
2. Return Receipt Postcard

APPENDIX C

NOTICE TO ALL OFFICERS AND EMPLOYEES OF THIS FACILITY

The Secretary of Defense has designated this facility as a "defense facility" pursuant to section 5 of the Internal Security Act of 1950 as amended (64 Stat. 987, 992; 50 U.S.C. 784).

I. When a Communist organization as defined in section 3(5) of the Act as amended (64 Stat. 987, 990; 50 U.S.C. 782(5)) is registered with the Attorney General of the United States or there is in effect a final order of the Subversive Activities Control Board requiring such organization to register, it is unlawful for any member of such organization, with knowledge or notice that such organization is registered or that such order has become final—

(a) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(b) if such organization is a Communist-action organization, to engage in any employment in any defense facility.

II. It is unlawful for any officer or employee of a defense facility, with knowledge or notice that a Communist organization is so registered or that such an order has become final—

(a) to contribute funds or services to such organization; or

(b) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or

omission would constitute a violation of the provisions set forth in Paragraph I above.

The Communist Party of the United States of America, since October 20, 1961, has been and is under a final order of the Subversive Activities Control Board to register with the Attorney General as a Communist-action organization. Therefore, the foregoing provisions of the Internal Security Act are presently applicable as to the Communist Party of the United States of America and its members.

Section 15(c) of the Act (64 Stat. 987, 1002; 50 U.S.C. 794(c)) provides that any individual who violates any of the above prohibitions shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

[SEAL]

THE DEPARTMENT OF DEFENSE

August 1962

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 228494 124